

**From:** Herbert, Ian <iherbert@milchev.com>  
**Sent:** Wednesday, June 7, 2023 8:57 AM  
**To:** John Branch; Brandon Neuman; Sam Rosenthal; Jeff Kelly; Nate Pencook  
**Cc:** Behre, Kirby; Jones, Christopher; Rand, Ripley  
**Subject:** RE: Azima v. Del Rosso: Vital Deposition

John,

You have made clear for months that you don't intend to comply with your discovery obligations, and your email unilaterally cancels the Vital deposition. While we don't believe this is warranted or justified, and that your behavior is a flagrant violation of the FRCP, we see no point in spending the time and money to attend the deposition you threaten to make meaningless. You have been on notice for months of this deposition, and to cancel it last minute is both unjustified and unprofessional.

Based upon your continual refusal to engage in any meaningful discovery, and your refusal to produce any documents other than those your client and his cohorts stole from our client, we too will cancel your proposed deposition of Mr. Azima until you make a complete production of documents and set a date for the Vital deposition. You can't have it both ways. At some point soon, your clients will be required to address their criminal behavior in this matter.

Regards,  
Ian

**IAN A. HERBERT**  
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**From:** John Branch <john.branch@nelsonmullins.com>  
**Sent:** Monday, June 5, 2023 4:47 PM  
**To:** Herbert, Ian <iherbert@milchev.com>; Brandon Neuman <brandon.neuman@nelsonmullins.com>; Sam Rosenthal <sam.rosenthal@nelsonmullins.com>; Jeff Kelly <jeff.kelly@nelsonmullins.com>; Nate Pencook <nate.pencook@nelsonmullins.com>  
**Cc:** Behre, Kirby <kbehre@milchev.com>; Jones, Christopher <Chris.Jones@wbd-us.com>; Rand, Ripley <Ripley.Rand@wbd-us.com>  
**Subject:** RE: Azima v. Del Rosso: Vital Deposition

EXTERNAL

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Ian,

This follows up on the deposition of VMS which Plaintiff unilaterally noticed for June 8<sup>th</sup>. As you know, the Court has not re-set the hearing on the outstanding discovery motions nor ruled upon those heard on March 7<sup>th</sup>, meaning that neither the scope nor the privilege issues have been resolved. In your email of May 12<sup>th</sup>, Plaintiff took the position that, if Defendants did not waive their scope and privilege objections and testify without objection to Plaintiff's questions, Plaintiff would "consider your position to be that Mr. Del Rosso will not sit for the deposition...." Defendant is not going to waive its well-founded scope and privilege objections, so the dispute between the parties regarding them remains.

At this point, Defendants believe the appropriate course is to wait to conduct the deposition of VMS until after the pending discovery motions have been heard and decided. Where a motion for protective order is pending regarding the conduct of a deposition, a party is within its rights to refuse to sit for the deposition until the motion has been decided. *See Fed. R. Civ. P. 37(d)(2); Trident Atlanta, LLC v. Charlie Graingers Franchising, LLC*, 2019 WL 3162428, at \*1 (E.D.N.C. July 15, 2019) (rejecting argument that only an order on a motion for protective order excuses a non-appearance because “the Federal Rules require only that the motion be pending for the noticed party’s absence to be excused”). Here, Defendants have filed a number of motions for protective order, over the scope and privilege issues generally as well as the deposition of VMS specifically. As such, this correspondence is to notify you that, pursuant to Fed. R. Civ. P. 37(d)(2), VMS does not intend to attend the noticed deposition on June 8<sup>th</sup>. Accordingly, we assume you will not proceed on Thursday and VMS does not need to appear on that date.

Best regards,

John Branch



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JOHN E. BRANCH III PARTNER

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**From:** Herbert, Ian <[iherbert@milchev.com](mailto:iherbert@milchev.com)>

**Sent:** Monday, May 15, 2023 11:50 AM

**To:** Brandon Neuman <[brandon.neuman@nelsonmullins.com](mailto:brandon.neuman@nelsonmullins.com)>; John Branch <[john.branch@nelsonmullins.com](mailto:john.branch@nelsonmullins.com)>; Sam Rosenthal <[sam.rosenthal@nelsonmullins.com](mailto:sam.rosenthal@nelsonmullins.com)>; Jeff Kelly <[jeff.kelly@nelsonmullins.com](mailto:jeff.kelly@nelsonmullins.com)>; Nate Pencook <[nate.pencook@nelsonmullins.com](mailto:nate.pencook@nelsonmullins.com)>

**Cc:** Behre, Kirby <[kbehre@milchev.com](mailto:kbehre@milchev.com)>; Jones, Christopher <[Chris.Jones@wbd-us.com](mailto:Chris.Jones@wbd-us.com)>; Rand, Ripley <[Ripley.Rand@wbd-us.com](mailto:Ripley.Rand@wbd-us.com)>

**Subject:** RE: Azima v. Del Rosso: Vital Deposition

◀External Email▶ - From: [iherbert@milchev.com](mailto:iherbert@milchev.com)

Brandon,

Please see the attached revised notice.

Regards,  
Ian

**IAN A. HERBERT**

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**From:** Herbert, Ian  
**Sent:** Friday, May 12, 2023 4:30 PM  
**To:** Brandon Neuman <[brandon.neuman@nelsonmullins.com](mailto:brandon.neuman@nelsonmullins.com)>; 'John Branch' <[john.branch@nelsonmullins.com](mailto:john.branch@nelsonmullins.com)>  
**Cc:** Behre, Kirby <[kbehre@milchev.com](mailto:kbehre@milchev.com)>; 'Jones, Christopher' <[Chris.Jones@wbd-us.com](mailto:Chris.Jones@wbd-us.com)>; Rand, Ripley <[Ripley.Rand@wbd-us.com](mailto:Ripley.Rand@wbd-us.com)>  
**Subject:** Azima v. Del Rosso: Vital Deposition

Brandon,

We noticed the upcoming deposition of Vital in January and since then Defendants have attempted to block the deposition repeatedly: through meritless objections, a motion for protective order, and a motion to stay all discovery. We believe these motions are bad-faith attempts to continue to block all discovery in this case. You have made it clear that you do not intend to properly prepare Mr. Del Rosso to serve as a corporate representative for Vital and intend to improperly block relevant lines of questioning, as you did during Mr. Del Rosso's personal deposition. Please confirm that you have prepared your client regarding all topics in the notice of deposition and your client will respond substantively to our questions. Otherwise, we consider your position to be that Mr. Del Rosso will not sit for the deposition on Tuesday. Given the antics regarding the last deposition, if that is your position, we intend to re-notice the deposition for June 8.

We also note that we have repeatedly asked for assurances that Mr. Del Rosso's health has not deteriorated. Mr. Del Rosso has a terminal illness and you have represented repeatedly that he is the only person who can serve as a corporate representative. Please provide an update on the status of his health by Monday. In addition, we expect that if his health deteriorates in any way, you will let us and the court know immediately so that steps can be taken to preserve Vital's testimony. If evidence is lost because of your failure to ensure that evidence is properly preserved, we will seek all available remedies including sanctions and adverse inferences.

Regards,  
Ian

**IAN A. HERBERT**

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